87-288

Supreme Court, U.S.
FILED
JUL 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ANTONIO SAMPANG,

Petitioner,

vs.

R. MICHAEL MARSH, et al,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Antonio Sampang
520 N. Main St.
Marion, Virginia, 24354
(703) 783-8286

TO The Honorables, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Antonio Sampang, respectfully requests that a writ of certiorari issue to review the judgement of the Fourth Circuit Court of Appeals entered on April 24, 1987.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a default entry on the respondents could be set aside when the United States Court of Appeals, for the Ninth Circuit, ruled on my appeal, that an order transferring an action from one district court to another is not final, nor is an order setting aside the default.

2. Whether the petitioner could be fired with false and alleged offenses with no basis in fact and my termination done with malice, perjury

and conspiracy.

3. Whether the district court was reading and writing a different law on the filing date for an Equal Opportunity Commission complaint or the EEOC in Richmond, Virginia the legal arm on this matter was competent to accept, file, schedule and heard my complaint and finally issued me a letter of Right to Sue.

4. Whether after a pattern of arbitrary and capricious actions of the district courts, abuse of discretion, a manifest and naked abuse from the bench, a rule of expediency, no one is above the law, to wit: summary-dismissal, hearing, judgment and a summary denial of my petition for a rehearing, in violation of the due process of law, they just made a mockery of the constitution, I who

was wronged, can I nevertheless seek relief from this court?

PARTIES TO THE PROCEEDING

The petitioner, Antonio Sampang, a Family Medicine Private Practitioner in Marion, Virginia, is seeking review of the lower court's judgment.

Respondent R. Michael Marsh, is the Hospital Director and respondent, Frederick Allen, is the Medical Director both of Catawba Hospital, Catawba, Virginia, a state mental facility.

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OPINION BELOW

The opinion of the United States District Court for the Western District of Virginia is reprinted in Appendix B.

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was dated March 4, 1987, Appendix C. A timely petition for rehearing was denied on April 24, 1987. Appendix D, and this petition was filed within ninety days of that date. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides:

> Amendment XIV, Section 1: ". . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title VII of Civil Rights Act of 1964 provides:

> With respect to employer, "that it shall be an unlawful employment practice for an employer. . . . or otherwise to discriminate against any individual, with respect to his compensation or the terms, conditions or privileges of his employment, because, inter alia, of such individual's race, color, or national origin:"

STATEMENT OF THE CASE

This case is a civilian pay case involving an unlawful termination in which the petitioner is seeking punitive and compensatory damages, reinstatement and a hearing to clear my name.

I was employed by the State of Virginia as a Mental Health Physician B, when in the summer of 1982, I raised the issues of parking spaces for physicians and floor assignments of the doctor's. Then right after this, grade one and grade two offenses, numbering four of them were filed against me, in rapid sequence. On the fourth offense I was fired.

These offenses have no basis in fact. It was a summary dismissal. My means of livelihood was cut- off abruptly. From: Employee Standards

of conduct, Central Office of Employee Relations Division, Department of Mental Health & Retardation, Commonwealth of Virginia, May 1,1981, quote: "Employees may use the state grievance procedure in any matters related to the application of this policy."

From: Grievance Procedure For State Employees, Commonwealth of Virginia, Department of Employee Relations Counselors, Revised July 1, 1985: coverage of Personnel, (B) Excluded, subpar, (9) "Employees who would otherwise be eligible to use the grievance procedure in a discrimination complaints through the State Equal Employment Opportunity Complaint Procedure, upon acceptance of the complaint by the state EEO Office, become ineligible to use the

grievance procedure in the resolution of the complaint."

The EEOC, Equal Employment Opportunity Commission, the legal and competent authority to accept complaints filed my case and heard it. Later, a Right to Sue letter was given to the petitioner which was the start of this court case. I elected to pursue my complaint with the EEOC.

REASONS FOR GRANTING WRIT

I. THE PETITIONER'S RESIGNATION IN LIEW OF TERMINATION WAS INVOLUNTARY IN THAT BECAUSE OF HIS EMPLOYMENT STATUS HE WAS AT NO TIME ENTITLED TO CONTEST HIS TERMINATION.

The record establishes that on February 25, 1983, the petitioner received a letter terminating him effective March 31, 1983. Significantly, this termination was not a

proposed action but an effectuated one. Thus, on February 25, 1983 I was in fact already terminated. Board of Regents v. Roth, 408 U.S. 569, 92 S. Ct 2701 (1972)

I had no hearing or other "viable" vehicle in which to "stand pat and fight". "Whether an action is voluntary or involuntary is determined not by the form of action but by the circumstances that produced it. The Commission holds that an action requested by the employee is voluntary only if the employee has freedom of choice. "Federal Personnel Manual Supp 752-1 Subchapter S1 2a.

In the petitioner's case, the lack of any viable alternative or meaningful choice takes his act of resignation completely outside the realm of legal voluntariness. See,

Perlman v. U.S., 203 Ct. Cl. 397, 490 F. 2d 928, 932-33.

II. THE CIRCUMSTANCES SURROUNDING DR. SAMPANG'S SEPARATION FROM THE STATE DEPRIVED HIM OF HIS LIBERTY INTEREST GUARANTEED BY THE FOURTEENTH AMENDMENT.

Termination letter dated 2-25-83, second paragraph reads: "This is for the reasons of unsatisfactory job performance due to the accumulation of four Standards of Conduct violations and for repeated instances where your clinical competence and judgment have been considered inadequate and unsatisfactory."

Right after my separation, I applied for about 15 or so vacancies for which I was clearly qualified.

In the light of the damaging statements of the termination letter, it is not surprising that I received

negative replies, including a South Dakota Federal job where I was invited to vist and make a choice of the hospital I want to work for, with all expenses paid. That letter (termination) impugning my intellectual ability and competence in all likelihood foreclosed my future and damaged my reputation. Quite clearly, while it takes very little to damage a highly specialized medical career and reputation, it also would take very little time and effort to institute minimal procedures which would protect the individual physician's rights.

Since Dr. Sampang was terminated in a manner violative of his Fourteenth Amendment right to liberty, the Febuary 25, 1983 termination was a constitutional nullity. When petitioner resigned he was without choice

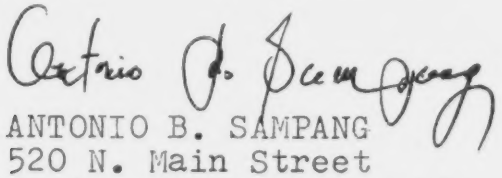
And acting involuntary as a matter of law under the threat of an unconstitutional termination action. As petitioner resignation was prompted by an unlawful and inherently coercive action by the State, it is deemed coercive and invalid. See Roskos v. U.S., 549F. 2d 1386, 1389-90(Ct.Cl. 1977) (and cases cited Therein), Atcherson v. Sibermann, 458 F. Supp 526 (S.D. Iowa 1978).

The resignation and termination both invalid, they must be set aside; Petitioner must be given his back pay, less interim earnings, and a hearing to clear his name so as to qualify for continued employment.

CONCLUSION

For the foregoing reasons, petitioner Antonio B. Sampang respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,



ANTONIO B. SAMPANG
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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 85-5763

Antonio B. Sampang, M.D.,	*	DC# CV-84-2807-B(I) Southern California
Plaintiff-Appellant,	*	
vs.	*	ORDER
Michael R. Marsh, Ph. D., and Frederick J. Allen, Ph. D.,	*	
Defendants-Appellees	*	

Submitted: July 22, 1985

Filed: August 2, 1985

Before PREGERSON, REINHARDT, AND BRUNETTI, Circuit Judges

The appeal is dismissed. An order transferring an action from one district court to another is not final. Pacific Car and Foundry Co. vs. Pence, 403 F.2d 949, 951 (9th Cir. 1968). Nor is in order setting aside a default. Thus, we dismiss the appeal for lack of a final order appealable under 28 U.S.C. S 1291. We, therefore, do not reach the merits of appellant's motion for appointment of counsel on appeal.

APPENDIX B

I.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ANTONIO B. SAMPANG, M.D.,

Plaintiff,

v. MEMORANDUM OPINION

R. MICHAEL MARSH, PH.D., et al.,

Defendants.

Dr. Antonio B. Sampang filed this action against Dr. R. Michael Marsh and Dr. Frederick J. Allen alleging that he was terminated from his employment in violation of his federal rights. The defendants have moved for summary judgment. For the reasons set forth below, the defendant's motion must be granted.

I. BACKGROUND

Dr. Antonio Sampang was employed as a staff physician by the Commonwealth of Virginia Department of Mental Health and Mental Retardation at Catawba Hospital beginning on February 1, 1976. The first few years of Dr. Sampan's tenure at Catawba appear to have passed uneventually. In the latter half of 1982, however, Dr. Sampang began to experience problems.

On October 8, 1982, Dr. Sampang was notified by Dr. Allen that his performance with respect to patient's medical records was inadequate. He was also notified of other problems with his performance, including improper prescriptions of Schedule II drugs to hospital employees, improper use of educational leave, interference in the facility's recruitment

process, and making inappropriate remarks when representing the Commonwealth in court proceedings.

On November 9, 1982, Dr. Sampang received a citation from his superiors at the hospital that he had committed a Group I violation of hospital rules. He was cited for "inadequate or unsatisfactory job performance in that recertification notes were not completed on a timely basis." Dr. Sampang was notified that he had a right to file a grievance challenging the disciplinary action, but he failed to do so. In addition, Dr. Sampang was given a copy of the Employee Standards of Conduct and the Grievance Procedure for State Employees.

On December 14, 1982, Dr. Sampang was cited For a Group II viola-

tion of the Employee Standards of Conduct for improperly prescribing a controlled substance, amphetamines, to Catawba Hospital employees in violation of Va. Code SS 54-317 and 54-524 and hospital policy. The disciplinary action was the result of the Virginia State Board of Medicine issuing Dr. Sampang a "cease and desist" letter. On December 17, 1982, Dr. Sampang was notified that this Group II offense would become a permanent part of his personnel record, that an additional Group II or Group III violation could result in his removal from Catawba Hospital, and that he had a right to file a grievance regarding the disciplinary action taken. Sampang did not file a grievance.

On February 23, 1983, Dr. Sampang received a citation for a Group

I violation for "unsatisfactory job performance in failing to exercise prudent and proper clinical judgment in the care of a certain fourth floor patient with a hip fracture." This action was the result of an investigation which revealed that Dr. Sampang did not provide proper care to the patient.

Finally, on February 25, 1983, Dr. Sampang received another citation for a Group I violation for "inadequate/unsatisfactory job performance in failing to complete patient recertifications as required on third floor on 2/10/83." On March 4, 1983, Sampang was notified of his right to file a grievance regarding the issuance of the February 23 and February 25 citations. He did not do so.

On February 25, 1983, Dr. Sampang was given notice of his termina-

tion, to be effective March 31, 1983. The notice stated that Dr. Sampang was being terminated because of unsatisfactory job performance[1] and the accumulation of four standards of conduct violations.

Upon receipt of the termination notice, Dr. Sampang requested reconsideration and a request to continue employment until his children completed their schooling. The defendants agreed that Dr. Sampang would be permitted to resign if he submitted a letter of resignation on March 22, 1983, such resignation to be effective July 31, 1983. Dr. Sampang left the hospital on July 31

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[1]There is evidence en the record that Dr. Sampang's job performance was unsatisfactory on occasions other than those for which he was formally cited.

after being provided a letter confirming his resignation on April 8.

Beginning in December 1983, approximately five months after his retirement, Dr. Sampang wrote a series of letters to public officials complaining of his termination and alleging misconduct on the part of doctors at Catawba Hospital. These letters were sent to Governor Robb and Secretary of Human Resources Fisher, among others.

On September 15, 1983, Dr. Sampang wrote a letter to the Equal Employment Opportunity Commission ("EEOC") complaining of discrimination in his termination. EEOC responded on September 30 that the September 15 letter did not provide sufficient information to file a formal Charge with EEOC and encouraged Dr. Sampang to contact EEOC regarding

additional information needed to file a charge. The EEOC's letter to Dr. Sampang noted that EEOC charges must be timely filed, and urged him to contact EEOC "as soon as possible"

On January 23, 1984, Dr. Sampang filed a formal complaint with EEOC alleging discrimination based on national origin. He amended his complaint, making substantial changes, on February 13, 1984. In August 1984, the EEOC sent Sampang a right to sue letter indicating that the EEOC had found no basis for his allegations.

The present action was filed thereafter. After proceedings in the Southern District of California, the action was transferred to this court. Currently before the court are the plaintiff's amended complaint of December 5, 1984, and the defendants' motion for summary judgment.

II. ANALYSIS

Plaintiff has raised a number of allegations in his complaint. The court will deal with these in turn.

III. TITLE VII CLAIM

Liberally construed, Dr. Sampang's complaint states a cause of action under Title VII, 42 U.S.C. S 2000e et seq. The statue requires a plaintiff to file a charge of discrimination. Dr. Sampang received notice of his termination on February 25, 1983, and this is the last action for which he could complain. Dr. Sampang first wrote to EEOC on September 15, 1983. This was over six months after the February termination. Thus, Sampang't Title VII claim is time-barred.

Even if Dr. Sampang's complaint were to be read to complain of events

taking place in March 1983, the court does not believe the claim is timely. While Sampang's September 15 letter may have tolled the 180-day filing period, the record is clear that EEOC responded by letter of September 30, 1983, and that Dr. Sampang failed to formally file a charge until over three months later. Even assuming the September 15 letter tolled the 180-day period, that period must have begun to run again in early October when Sampang received the EEOC response. Adding the five-plus months prior to the September 15 letter to the three-plus months following the EEOC's response, the court must conclude that the January 23, 1984 filing was time-barred.

For these reasons, defendants' motion for summary judgment on the Title VII claim must be granted.

IV. CONSTITUTIONAL CLAIMS

Dr. Sampang's complaint alleges that his termination violated a number of rights secured to him by the U. S. Constitution. The court will consider these in turn.

A. FIFTH AMENDMENT

In paragraphs 20d and 22 of his complaint, Dr. Sampang alleges that his right to liberty, guaranteed to him by the Fifth Amendment, was violated by the defendants. The court does not believe that this claim states a cause of action for which relief can be granted. Accordingly, summary judgment will be granted to the defendants on these claims.

B. DUE PROCESS VIOLATIONS

Liberally construed, Dr. Sampang's complaint alleges that the defendants failed to comply with due process requirements when terminating

him. For instance, Dr. Sampang noted at the hearing that the defendants failed to suspend him after his third offense, in violation of their own rules. The record is clear, however, that the defendants notified Dr. Sampang of his right to grieve the disciplinary and termination actions taken against him. The record is equally clear that Dr. Sampang did not institute any grievance proceedings. Accordingly, Dr. Sampang waived his claim under the Due Process Clause. Buschi v. Kirven, 775 F. 2d 1240, 1259 (4th Cir. 1985). Since Sampang cannot now be heard to complain that his termination did not comport with the requirements of Due Process, The defendants' motion for summary judgment will be granted on this claim as well.

C. FIRST AMENDMENT VIOLATIONS

Liverally construed, Dr. Sampang's complaint alleges that the defendants terminated him in retaliation for writing letters to public officials in which he makes allegations of misconduct at Catawba Hospital. The court does not believe that these letters were the cause of Dr. Sampang's termination, because the letters were written after plaintiff received his notice of termination. Accordingly, summary judgment will be granted to the defendants on this claim.

Finally, Dr. Sampang plainly alleges that he was terminated because he spoke out about hospital floor assignments and allegedly inadequate parking facilities at the hospital. As a public employee asserting a violation of his First

Amendment right of free speech, Sampang "must demonstrate (1) that the speech complained of qualified as protected speech or activity and (2) that such protected speech or activity was the 'motivating' or 'but for' cause for his discharge . . . . . " Jurgensen v. Fairfax County, Virginia, 745 F.2d 868, 878 (4th Cir. 1984). The rationale for this two-step analysis is that "the First Amendment guarantee of free speech is not absolute, and this is particularly so in the case of public employees, since the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizency in general."

Jurgensen, 745 F.2d at 878. In the instant case, it will be unnecessary for the court to conduct both steps of the two-stage analysis set forth in Jurgensen, for the court believes that Sampang's speech was not protected.

In order to determine when a public employee's speech is protected by the First Amendment, the Supreme Court has established a test that balances the interests of the employee as a citizen against the interests of the state as an employer. The test is developed in Pickering v. Board of Education, 391 U.S. 563 (1968) and Connick v. Myers, 461 U.S. 138 (1983), and consists of two parts. The first prong of the test considers whether the speech qualifies as a matter of public concern.

The second prong of the test considers the effect of such speech on the efficiency, discipline and proper administration of the agency. See Jurgensen, 745 F.2d at 879. If the speech of activity in question cannot fairly be characterized as constituting speech or activity on a matter of public concern, no analysis will be reached under the second prong of the text, and no First Amendment protection will attach. Id. at 878.

In determining whether the speech or activity in question is on a matter of public concern, this court follows the guidance of . . Jurgensen:

> One of the significant factors to be initially considered in deciding whether the "speech" relates to "a matter of public concern" is the subject matter of the speech or action. If the speech relates primarily to a matter of "limited public

> interest" and does not "seek to bring to light actual or potential wrongdoing or breach of public trust, "centering instead on matters primarily, if not exclusively "of personal interest" to the employee such as employee grievances over internal working conditions, etc., that fact must be weighed in determining whether a matter of true public concern is involved(,) for the "First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." Where personal or employee grievances are more the subject-matter of the speech than matters of public interest it is the rule that "a qide degree of deference to the employer's judgment is appropriate."

Jurgensen, 745 F.2d at 879 (Citations omitted). Applying these standards to the case at bar, the court concludes that plaintiff's complaints about floor assignments and parking spaces do not qualify as matters of public concern. These matters are of no public interest and do not deal with wrongdoing or breach of the public concern, the speech was not pro-

tected by the First Amendment. Accordingly, summary judgment will be granted to the defendants on this claim.

CONCLUSION

For the foregoing reasons, the summary judgment will be granted to the defendants on all of plaintiff's claims.

DATED: April 29, 1986

JAMES C. TURK, Chief
United States
District Judge

APPENDIX B

II.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ANTONIO B. SAMPANG, M.D.,

Plaintiff

vs. FINAL ORDER

R. MICHAEL MARSH, PH. D., et al.,

Defendants

On March 31, 1986, a hearing was held in open court on the defendants' motion for summary judgment. At that time, the court took the matter under advisement to permit the plaintiff to attempt to secure the assistance of counsel. The plaintiff notified the court on April 15, 1986 that he had been unable to secure counsel to assist him, and that he had given up his search. Accordingly, the court

believes the matter is now ripe for disposition.

For the reasons set forth in the accompanying memorandum opinion, it is hereby

ADJUDGED and ORDERED

that the defendants' motion for summary judgment is GRANTED.

The Clerk of Court is directed to strike this case from the active docket of the court and to certify copies of this order and the accompanying memorandum opinion to plaintiff and counsel for the defendants.

DATED: April 29, 1986

JAMES C. TURK, Chief
United States
District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 86-1124

Antonio B. Sampang,	*	
	*	Appeal from
Appellant,	*	the United
	*	States District
vs.	*	Court for the
	*	Western District
R. Michael Marsh,	*	of Virginia,
Frederick J. Allen;	*	at Roanoke
	*	
Appellees.	*	
	*	

Submitted: January 28, 1987

Decided: March 4, 1987

Before SPROUSE, ERVIN, AND WILKINS,
(Circuit Judges.)

(Antonio B. Sampang, Appellant Pro Se.
Francis Walter Pedrotty, Office of the
Attorney General, for Appellees.

PER CURIAM:

A review of the record and the district court's order refusing relief on plaintiff's claim that he was terminated from his employment in violation of his federal rights is without merit. Because the dispositive issues recently have been decided authoritatively, we dispense with oral argument and affirm the judgment below on the reasoning of the district court.

Sampang v. Marsh, C/A No. 85-375-R (W.D.Va., Apr. 30, 1986).

AFFIRMED

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 86-1124

Antonio B. Sampang, Appellant.

vs.

R. Michael Marsh, et al, Appellees.

On Petition for Rehearing.

O R D E R

Upon consideration of the appellant's pro se petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Wilkins for a panel consisting of Judge Wilkins, Judge Sprouse and Judge Ervin.

For the Court,

JOHN M. GREACEN

CLERK